No. 3931

United States
Circuit Court of Appeals
For the Ninth Circuit.

18

WM. H. MOORE, JR., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a partnership composed of Harry J. Kimball, Jr., and Rex Webb, and Harry J. Kimball, Jr., and Rex Webb, as individuals, bankrupt,

Appellant,

vs.

T. E. RISLEY,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

FILED
JAN 24 1922
F. D. MONCKTON,
CLERK

PARKER & STONE CO., Law Printers, 232 New High St., Los Angeles, Cal.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WM. H. MOORE, JR., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a partnership composed of Harry J. Kimball, Jr., and Rex Webb, and Harry J. Kimball, Jr., and Rex Webb, as individuals, bankrupt,

Appellant,

vs.

T. E. RISLEY,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Wm. H. Moore, Jr., Trustee in Bankruptcy, Petitioner and Appellant:

ELMORE WINKLER, Esq., and

W. T. CRAIG, Esq., Board of Trade Rooms, Higgins Building, Los Angeles, Cal.

For T. E. Risley, Respondent and Appellee:

FRANK KAUKE, Esq., Fresno, Cal.

CITATION.

United States of America, ss.

To T. E. RISLEY GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, on the 27th day of January A. D. 1922, pursuant to the appeal duly obtained and filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain controversy arising in the matter of Kimball & Webb, a partnership composed of Harry J. Kimball, Jr. and Rex Webb, and Harry J. Kimball, Jr., and Rex Webb as individuals, Bankrupt, now pending in the District Court of the United States for the Southern District of California, Northern Division, and being case No. 767 in Bankruptcy of said Court, wherein Wm. H. Moore, Jr., as Trustee in Bankruptcy of the estate of said Kimball & Webb, Bankrupt is Appellant, and you are Appellee to show cause, if any there be, why the Minute order entered in said District Court on the 19th day of December, 1921, affirming the order dated November 8th, 1921, heretofore made in said Bankruptcy proceedings by Clyde H. Thompson, Esq., Referee in Bankruptcy, denying the prayer of the petition of said Wm. H. Moore, Jr., filed in said proceeding and discharging the rule of the order to show cause issued on said petition, in the said bankruptcy proceeding mentioned, should not be corrected, and

speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable BENJAMIN F. BLEDSOE United States District Judge for the Southern District of California, this 30th day of December, A. D. 1921, and of the Independence of the United States, the one hundred and forty fifth

Bledsoe

U. S. District Judge for the Southern District of California.

Receipt of copy of the foregoing Citation is hereby admitted this 4th day of January, 1922.

Frank Kauke

Attorney for Respondent and Appellee.

Endorsed: ORIGINAL No. 767 - Bkcy—*In the* United States Circuit Court of Appeals *for the* NINTH CIRCUIT WM. H. MOORE, JR., as Trustee in Bankruptcy of the Estate of Kimball & Webb, a partnership, composed of Harry J. Kimball, Jr and Rex Webb, and Harry J. Kimball, Jr. and Rex Webb as individuals; Appellant *vs.* T. E. RISLEY Appellee Citation FILED Jan 9 - 1922 at 55 min. past 10 o'clock A. M. *CHAS. N. WILLIAMS, Clerk,* Murray E. Wire, *Deputy.*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

---oOo---

In the Matter of KIMBALL & WEBB, a partnership composed of Harry J. Kimball, Jr., and Rex Webb, and Harry J. Kimball, Jr., and Rex Webb, as individuals, Bankrupts.	In Bankruptcy, No. 767. ORDER OF REFEREE.

WHEREAS, in the above entitled matter, Wm. H. Moore, Jr., Trustee in Bankruptcy herein, presented and filed his petition praying that an order be made herein requiring T. E. Risley to be and appear before said Court to show cause why an order should not be made and entered herein decreeing that the lease of the premises designated by the number 1141 J Street, in the City of Fresno, in the County of Fresno, State of California, originally made by and between T. E. Risley, as lessor, and Rex Webb, J. H. Koll and H. J. Kimball, Jr., as lessees, bearing date the 4th day of October, 1919, and being a lease originally made for the term of ten years, commencing on the 1st day of January, 1920, is an asset of the above named bankrupt estate, and directing said trustee to sell said lease as an asset of said estate, and restraining said T. E. Risley, his agent and attorneys, from

in any way interfering with such sale, or the purchaser thereat, and from any way stating or claiming that said bankrupt has no interest in said lease or leasehold interest, or that said lease or leasehold interest has been terminated; and,

WHEREAS, an order to show cause was issued herein in accordance with the prayer of said petition, and the said T. E. Risley on the 25th day of October, 1921, made and filed herein his answer thereto, and said matter was duly set for hearing before the undersigned Referee on the 5th day of November, 1921; and,

WHEREAS, the said Wm. H. Moore, Jr., as such trustee, petitioner, and the said T. E. Risley, respondent herein, by their respective counsel, on the 5th day of November, 1921, made and filed herein a stipulation containing an agreed statement of the facts; and,

WHEREAS, thereafter on said 5th day of November, 1921, said matter came on regularly for hearing and determination before the undersigned Referee, upon the petition of the said trustee, the answer thereto of the said T. E. Risley, and the agreed statement of facts herein, and, after argument by Messrs. H. R. Archbald and Elmore Winkler, as attorneys for petitioner, and by Frank Kauke, as attorney for the respondent, the matter was submitted to the undersigned Referee for consideration and decision, and said matter having been duly considered, the said Referee, upon the said petition and answer and the facts so stipulated and agreed upon by the respective parties

hereto, does now find and declare his conclusions of law therefrom as follows, to wit:

That said lease has been terminated and is at an end, and that the same is not an asset of the above named bankrupt estate.

That neither the said petitioner nor the said J. H. Kimball, Jr., or Rex Webb, has any right whatsoever under said lease, nor any right to sell, assign or dispose of the same.

That the said T. E. Risley is entitled to the possession of said leased property.

And by reason of the agreed facts, and the said conclusions of law, it is now hereby ordered and adjudged that the said order to show cause be and the same is discharged; and that the petition of the said trustee is denied.

Dated this 8th day of November, 1921.

CLYDE H. THOMPSON.

Referee.

Endorsed: In Bankruptcy No. 767. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION. In the Matter of KIMBALL & WEBB, a partnership composed of Harry J. Kimball, Jr., and Rex Webb, and Harry J. Kimball, Jr., and Rex Webb, as individuals, Bankrupt. ORDER OF REFEREE FILED November 8th, 1921 at 10 o'clock A. M. CLYDE H. THOMPSON, Referee. FILED Jan 13 1922 at 35 min. past 1 o'clock P. M.

CHAS. N. WILLIAMS, Clerk Murray E. Wire, *Deputy.*

ORIGINAL

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

In Bankruptcy No. 767.

In the Matter of	)
	)
KIMBALL & WEBB, a partnership composed of HARRY J. KIMBALL, JR. and REX WEBB, and Harry J. Kimball, Jr. and Rex Webb, as individuals,	) STATEMENT)OF THE CASE) ON APPEAL.))
Bankrupt.	)

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STATEMENT OF FACTS.

Shortly prior to October 4th, 1919, Rex Webb, J. H. Koll and H. J. Kimball, Jr., contemplated commencing and transacting a gents furnishing and clothing business at No. 1141 J Street, Fresno, California. On October 4th, 1919, a lease for said premises was made in duplicate, T. E. Risley, respondent herein and the owner of said premises being the lessor named therein and said Rex Webb and H. J. Kimball, Jr., with one J. H. Koll being named as lessees therein; that said lease was for a period of ten years, com-

mencing January 1st, 1920, and ending December 31st, 1929, and contained the following express terms and conditions:

"And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and remove all persons therefrom without notice***

It is hereby covenanted and agreed that this lease and the interest of said lessee hereunder shall not without the written consent of said lessor first had and obtained, be subject to garnishment or sale under execution in any suit or proceedings which may be brought against or by said lessees, and that this lease and all the rights of said lessees hereunder, shall, at the option of the lessor cease and terminate upon said lessees being by any court adjudged bankrupt or insolvent, or upon said lessees making an assignment for the benefit of creditors."

On or about January 1st, 1920, said lessees took possession of said premises and installed certain improvements therein.

Before any merchandise was actually moved into the building and business opened, Koll severed his connection with Rex Webb and H. J. Kimball, Jr., and there was prepared duplicate copies of the following, which were signed by the parties and attached to the lease.

"For value received, I hereby sell and assign to Rex Webb and H. J. Kimball, Jr., all my right, title and interest in and to the attached lease.

Fresno, Cal.

J. H. Koll

And in consideration of the foregoing assignment to us, we hereby agree to be bound by and comply with all the terms and conditions of said lease.

Fresno, Cal. Rex Webb

H. J. Kimball, Jr.

And in consideration of the foregoing promise and agreement, I consent to said assignment.

Fresno, Cal."

T. E. Risley,"

Said Rex Webb and H. J. Kimball continued in possession of said premises and paid the rent as it fell due out of the proceeds of said business until the 24th day of July, 1921, when possession of said premises was taken by Wm. H. Moore, Jr., who was appointed Receiver in Bankruptcy herein on an involuntary petition in bankruptcy filed against Kimball & Webb, a partnership composed of said H. J. Kimball, Jr., and said Rex Webb, and against said H. J. Kimball, Jr., and Rex Webb, as individuals. That said Receiver paid the rent for said premises on August 1st, 1921, for the month of August, said year.

That on the 15th day of August, 1921, said partnership of Kimball & Webb and said H. J. Kimball, Jr., and said Rex Webb, as individuals, were each ad-

judged bankrupt herein. Said J. H. Koll has not been adjudged bankrupt.

On the 8th day of August, 1921, Wm. H. Moore, Jr., Receiver in said bankruptcy, sent to T. E. Risley a communication in writing as follows:

"T. E. Risley,
c/o Sam Trotter,
Monterey, California.

Dear Sir:

Please be advised that an involuntary petition in bankruptcy has been filed against Kimball & Webb of Fresno who have been occupying a store at 1151 J Street in your building. The undersigned has been appointed Receiver by the Court.

In looking over the lease I note that the original lessees were Rex Webb, J. H. Koll and H. J. Kimball. I also note that there is a provision in the lease to the effect that the lease and all the rights of the lessees therein shall, at the option of the lessor cease and terminate upon said lessee being by the Court adjudged bankrupt or insolvent. In this connection I might add that Mr. J. H. Koll, one of the lessees, has not been adjudged bankrupt and it would therefore seem to me that this provision of the lease which I have just cited will be inoperative in the present instance, but however that may be, I desire to inquire your attitude in respect to an assignment of the lease to such responsible party as I may be able to find who will take over the business of Kimball & Webb.

A great many responsible parties have inquired concerning the purchase of the stock of merchandise, store furniture and fixtures but each and every one of them are very much interested in knowing whether the lease can be assigned. I believe your agent at Fresno has indicated to my representative there that in all probability you would consent to the assignment of the lease to a responsible party.

May I ask you to kindly let me have your views on the matter so that I may be guided in the administration of the estate along lines that will be to the best interests of all parties interested. Kindly confer the courtesy of an early response on,

Yours truly,
Wm. H. Moore, Jr.,
Receiver."

Under date of August 10th, 1921, T. E. Risley replied to the above communication in words as follows:

"Wm. H. Moore,
Receiver in Bankruptcy,
704 Higgins Building,
Los Angeles, Cal.

Dear Sir:

I have before me your letter of the 8th inst. in re Kimball & Webb bankruptcy matter.

I beg to advise you that I have attached to my copy of my lease with Kimball & Webb an assignment of the J. H. Koll interest in the lease to Kimball & Webb. This assignment was made in duplicate, I

kept one copy and personally handed Kimball the other copy with the request that he attach the same to his copy of his lease. This I believe clears up the apparent situation as set out by you in the matter of the lease being terminated by their act of bankruptcy. My lease is with my papers in Fresno, where I will return Sept. 1st, at which time I will be pleased to exhibit it to your representative.

In the matter of my assigning the Kimball & Webb lease I take the position that in that you as Receiver in Bankruptcy in the U. S. District Court have officially advised me that Kimball & Webb are involuntary bankrupts and in that the lease they held with me provided to the effect that the lease and all the rights of the lessees therein shall, at the option of the lessor, cease and terminate upon said lessee being by the Court adjudged bankrupt or insolvent, therefore I will consider the lease terminated at the time the court decides that Kimball and Webb to be bankrupt.

Considering that the lease will be terminated at the above stated time I will then be in a position to enter into a new lease with new people on terms and conditions to be decided at the time.

If it will assist you in disposing of the stock and fixtures I would be very glad to talk lease with responsible people. Of course, you can readily understand that the new lease will call for a material increase in the rental. Mr. W. G. Wharton at 1933 Fresno St., Fresno, my agent, is somewhat conversant with my desires in the matter of a tenant so your

Fresno representative may take up prospective tenants with him during my absence.

Trusting I am made myself clear, I am,

Yours very truly,

T. E. Risley."

Following said communications Mr. Moore caused to be handed to Mr. Risley a check, dated August 30, 1921, for the sum of $350.00, signed by Wm. H. Moore, Jr., Receiver of the estate of Kimball & Webb, bankrupt, and countersigned by Clyde H. Thompson, Referee in Bankruptcy, on the back of which was the following writing: September 1921 rental of store at 1141 J Street, Fresno, under lease dated October 4, 1919, $350.00."

On receipt of said check Mr. Risley took same to said Referee and told him that he intended to exercise his option under the lease to cancel it, Kimball and Webb having been adjudged bankrupt, and asked the Referee if he would forfeit his right so to do if he accepted the check considering the indorsement. The Referee stated to Mr. Risley that he did not think the Receiver intended to take any advantage of him in that particular.

Thereafter Mr. Risley obliterated the following words and figures of the indorsement, viz., "under lease dated Oct. 4, 1919, $350.00," and Mr. Risley then indorsed and cashed said check.

The following month, Mr. Moore, having been elected Trustee of said estate in the meantime, he

caused to be delivered to Mr. Risley another check, dated October 1, 1921, for the sum of $350.00, signed by Mr. Moore as such Trustee and countersigned by the Referee, for the sum of $350.00, with the following indorsement, "Oct. rental under lease, $350.00."

On receipt of said check Mr. Risley obliterated the words and figures "under lease, $350.00," and thereupon cashed said check.

On or about the 20th day of September, 1921, the said T. E. Risley caused to be delivered to each of said Wm. H. Moore, Jr., Trustee, and H. J. Kimball, Jr., and Rex Webb, a written notice, stating in substance that on August 15th, 1921, said Harry J. Kimball, Jr., and Rex Webb were adjudged bankrupt, and that by virtue of the provisions of said lease said lessor exercised his option to terminate said lease, and the rights of the lessees and of said Wm. H. Moore, Jr., Trustee in Bankruptcy of said estate, and any and all persons claiming or to claim under said lessees and said Trustee, and demanded possession of said premises.

The unexpired term of said lease is of a value in excess of the rental required to be paid therefor.

PROCEEDINGS OF THE CONTROVERSY.

On or about the 7th day of October, 1921, said Trustee in Bankruptcy filed his petition with Clyde H. Thompson, Esquire, the Referee in Bankruptcy of said Court, to whom said bankruptcy matter was referred, praying for the issuance of an order to show

cause, requesting said T. E. Risley to show cause before said Referee, why an order should not be made and entered by said Referee, decreeing said lease to be an asset of said bankrupt estate, directing said Trustee to sell the same as such asset, and restraining said Risley, his agents and attorneys from in any way interfering with said sale or the purchaser thereat. An order to show cause was issued by said Referee as prayed for, returnable October 25th, 1921, at which time said T. E. Risley answered said petition and order to show cause alleging that said lease and all rights under the same were terminated by the lessor having exercised his option so to do under the covenant of the lease upon the adjudication of said Kimball and Webb, a bankrupt.

A hearing was had in the office of said Referee on November 5th, 1921, on an agreed statement of facts, and said Referee made an order November 8th, 1921, discharging the rule of said order to show cause and denying said petition. Said Trustee filed his petition with said Referee for a review of said order by the District Court, whereupon said Referee prepared and filed in said District Court of the United States his certificate on review. The question on review was argued before said District Court on December 19th, 1921, and submitted, whereupon the minute order of said Court from which this appeal is taken was made and entered on said 19th day of December, 1921, affirming the order of said Referee.

The question presented by this appeal is: Was said lease and all rights under it terminated under the facts of the case, or is said lease still in force and effect and the property of the Trustee in Bankruptcy, he having elected to accept the same as an asset, and it is stipulated that said question can be determined by the Appellate Court without an examination of the pleadings filed in said controversy and by reference only to the papers and records mentioned in the praecipe for transcript of record filed herein.

Elmore Winkler and W. T. Craig,
Attorneys for Petitioner, Wm. H. Moore,
Jr., as Trustee in Bankruptcy.

Frank Kauke,
Attorney for Respondent, T. E. Risley.

The foregoing statement of the case on appeal is hereby approved.

DATED: December 29th, 1921.

Bledsoe
United States District Judge.

Endorsed: ORIGINAL *No. 767* In United States District Court Southern District of California Northern Division *In the Matter of* KIMBALL & WEBB *Bankrupt* STATEMENT OF THE CASE ON APPEAL. FILED Dec. 29 1921 at 45 min. past 4 o'clock P. M. *CHAS. N. WILLIAMS, Clerk* Douglas Van Dyke, *Deputy.* W. T. CRAIG & Elmore Winkler BOARD OF TRADE ROOMS HIGGINS BUILD-

ING TELEPHONES: HOME 10112, SUNSET MAIN 4622
LOS ANGELES CAL. *Attorney for*————————

At a stated term, to wit, the JULY Term, A. D. 1921, of the District Court of the United States of America, within and for the Northern Division of the Southern District of California, held at the court room thereof, in the city of Los Angeles on Monday the Nineteenth day of December in the year of our Lord one thousand nine hundred and twenty one.

Present: THE HONORABLE BENJAMIN F. BLEDSOE, District Judge.

In the Matter of	)	
	)	
Kimball & Webb,	)	No. 767 Bkcy. N. D.
a partnership, etc.,	)	
	)	
Bankrupts.	)	

-------ooOoo-------

This matter coming on regularly at this time for hearing on Review of Referee's Order; Elmore Winkler, Esq. and H. R. Archbald, Esq. appearing as counsel for petitioner, and Frank Kauke, Esq. appearing as counsel for respondent, T. E. Risley; and this matter having been called and respective counsel having answered ready, and H. R. Archbald, of counsel as aforesaid, having made argument in support of petition for Review of Referee's Order, and Elmore Winkler, Esq., having made argument in support of

Petition for Review and Frank Kauke having made argument in opposition to the Petition for Review and H. R. Archbald, Esq. having made argument in rebuttal, it is now ordered by the Court that the Order of the Referee entered herein be and the same hereby is affirmed.

ORIGINAL.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION

In Bankruptcy No. *767*

In the Matter of KIMBALL & WEBB, a partnership composed of HARRY J. KIMBALL, JR. and REX WEBB, and Harry J. Kimball, Jr., and Rex Webb as individuals, Bankrupt.	NOTICE OF APPEAL.

.

To T. E. Risley, and to Frank Kauke, Esquire, his Attorney, and

To Chas. N. Williams, Clerk of the District Court of the United States for the Southern *Disrict* of California:

YOU, and EACH OF YOU, will please take notice that Wm. H. Moore, Jr., as Trustee in Bankruptcy

of the estate of Kimball & Webb, a partnership composed of Harry J. Kimball, Jr. and Rex Webb, and Harry J. Kimball, Jr. and Rex Webb, as individuals, hereby appeals from the minute order entered herein on the 19th day of December, 1921, affirming the order dated November 8th, 1921, heretofore made herein by Clyde H. Thompson, Esquire, Referee in Bankruptcy, denying the prayer of the petition of said Wm. H. Moore, Jr., heretofore filed herein and discharging the rule of the order to show cause issued on said petition relative to the lease mentioned and described in the order of said Referee in Bankruptcy, to the Circuit Court of Appeals for the Ninth Circuit to be holden in and for said Circuit in the City and County of San Francisco, in the state of California.

DATED: this 22nd day of December, 1921.

Elmore Winkler and W. T. Craig
Attorneys for said Trustee and Petitioner.

Endorsed: ORIGINAL *No. 767* In United States District Court Southern District of California Northern Division *In the Matter of* KIMBALL & WEBB *Bankrupt* NOTICE OF APPEAL FILED Dec 29 1921 at 40 min. past 2 o'clock P. M. *CHAS. N. WILLIAMS, Clerk* Douglas Van Dyke, *Deputy. Service of the within* Notice of Appeal *is hereby admitted this 27th day of December 1921* FRANK KAUKE *Attorney for* Respondent, T. E. Risley, W. T. CRAIG Elmore Winkler BOARD OF TRADE ROOMS HIGGINS BUILDING TELEPHONES: HOME

10112, SUNSET MAIN 4622 LOS ANGELES CAL.
Attorney for ————————————

ORIGINAL

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

In Bankruptcy No. 767.

In the Matter of KIMBALL & WEBB, a partnership composed of HARRY J. KIMBALL, JR. and REX WEBB, and Harry J. Kimball, Jr. and Rex Webb, as individuals, Bankrupt.	PETITION FOR ALLOWANCE OF APPEAL AND ORDER ALLOWING SAME.

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To the Honorable Judges of the United States District Court, for the Southern District of California, Northern Division:-

Wm. H. Moore, Jr., as Trustee in Bankruptcy of the estate of Kimball & Webb, a partnership composed of Harry J. Kimball, Jr., and Rex Webb, and Harry J. Kimball, Jr. and Rex Webb, as individuals, conceiving himself *agreed* by the minute order entered in the above entitled matter on the 19th day of December, 1921, affirming the order of Clyde H. Thomp-

son, Esquire, Referee in Bankruptcy of this Court, to whom the above matter was referred, said order being dated November 8th, 1921, denying the petition of said Wm. H. Moore, Jr., as such Trustee, and discharging the rule of the order to show cause issued thereon against T. E. Risley, does hereby petition for an appeal from the said minute order to the United States Circuit Court of Appeals for the Ninth Circuit and prays that this appeal may be allowed and a citation granted directed to said T. E. Risley, commanding him to appear before the United States Circuit Court of Appeals for the Ninth Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the records, proceedings and evidence in said proceeding, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Wm. H. Moore, Jr.
Trustee in Bankruptcy of the Estate of
Kimball & Webb, a partnership, etc.

Elmore Winkler and W. T. Craig
Attorneys for Trustee and Petitioner.

The foregoing appeal is hereby allowed, no bond being required of petitioner under section 25c of the Bankruptcy Act.

DATED: December 29th, 1921.

Bledsoe
United States District Judge.

Endorsed: ORIGINAL *No. 767* In United States District Court Southern District of California North-

ern Division *In the Matter of* KIMBALL & WEBB *Bankrupt* PETITION FOR ALLOWANCE OF APPEAL AND ORDER ALLOWING SAME. FILED Dec 29 1921 at 40 min. past 2 o'clock P. M. *CHAS. N. WILLIAMS, Clerk* Douglas Van Dyke, *Deputy. Service of the within* Petition for Appeal *is hereby admitted this 27, day of* Dec. *1921* Frank Kauke *Attorney for* Respondent, T. E. Risley W. T. CRAIG & Elmore Winkler BOARD OF TRADE ROOMS HIGGINS BUILDING TELEPHONES: HOME 10112, SUNSET MAIN 4622 LOS ANGELES CAL. *Attorney for*———————————————

ORIGINAL

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

In Bankruptcy No. *767.*

In the Matter of KIMBALL & WEBB, a partnership composed of HARRY J. KIMBALL, JR. and REX WEBB, and Harry J. Kimball, Jr. and Rex Webb, as individuals, Bankrupt.	)	ASSIGNMENT OF ERRORS.

.
.

Comes now Wm. H. Moore, Jr., as Trustee in Bankruptcy of the estate of Kimball & Webb, a partnership

composed of Harry J. Kimball, Jr. and Rex Webb, and Harry J. Kimball, Jr. and Rex Webb, as individuals, and files the following assignment of errors:-

First: The United States District Court for the Southern District of California, Northern Division, erred in affirming the order of Clyde H. Thompson, Esquire, Referee in Bankruptcy herein, dated November 8th, 1921, holding that the lease between T. E. Risley as lessor, and Rex Webb, J. H. Koll and H. J. Kimball, Jr., as lessees, was terminated and at an end, and that the same is not an asset of the above named bankrupt estate and that said Trustee has no right whatsoever in said lessee or any right to sell, assign or dispose of the same, and that said T. E. Risley is entitled to the possession of the property covered by said lease.

Second: That said Court erred in holding that there was a violation of the covenants in said lease providing that all rights of the lessees thereunder should at the option of the lessor cease and terminate upon said "lessees being by any Court adjudged bankrupt", one of said lessees, to-wit: J. H. Koll, not having been adjudged bankrupt.

Third: Said Court erred in holding that the acceptance of rent by said T. E. Risley under the circumstances of the case was not a waiver of any breach of the covenants providing for forfeiture of said lease by said Risley.

Fourth: Said Court erred in not disaffirming the order of said Referee and in not holding that said

lease was and is in full force and effect and the property of Wm. H. Moore, Jr., as Trustee in Bankruptcy of the estate of the above named bankrupt.

Elmore Winkler and W. T. Craig
Attorneys for said Trustee and Petitioners.

Endorsed: ORIGINAL *No. 767* In United States District Court Southern District of California Northern Division *In the Matter of* KIMBALL and WEBB *Bankrupt* ASSIGNMENT OF ERRORS FILED Dec 29 1921 at 40 min. past 2 o'clock P. M. *CHAS. N. WILLIAMS, Clerk,* Douglas Van Dyke, *Deputy. Service of the within* Assignment of Errors *is hereby admitted this 27 day of Dec. 1921* FRANK KAUKE *Attorney for* Respondent, T. E. Risley W. T. CRAIG & Elmore Winkler BOARD OF TRADE ROOMS HIGGINS BUILDING TELEPHONES: HOME 10112, SUNSET MAIN 4622 LOS ANGELES CAL. *Attorney for*————————

ORIGINAL

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA NORTHERN DIVISION.

In Bankruptcy No. *767.*

In the Matter of)	
)	
KIMBALL & WEBB, a)	
partnership composed of)	
HARRY J. KIMBALL,)	PRAECIPE FOR
JR. and REX WEBB, and)	TRANSCRIPT OF
Harry J. Kimball, Jr. and)	RECORD.
Rex Webb, as individuals,)	
)	
Bankrupt.)	

To Chas. N. Williams, Clerk of United States District Court for the Southern District of California:-

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above entitled proceeding, and to include in such transcript the following portions only of said record:

1. Statement of the case on appeal,
2. Order of Clyde H. Thompson, Referee, dated November 8th, 1921, discharging the rule of the order to show cause against T. E. Risley and denying the petition of Wm. H. Moore, Jr., Trustee in Bankruptcy herein.

3. Minute order of District Court of December 19th, 1921, affirming said Referee's order of November 8th, 1921, on hearing on review.
4. Notice of Appeal.
5. Petition for allowance of appeal and order allowing same.
6. Assignment of errors.
7. Citation on appeal.
8. Praecipe for transcript of record.

Elmore Winkler and W. T. Craig
Attorneys for Wm. H. Moore, Jr., Trustee in Bankruptcy, and Petitioner.

Receipt of a copy of the foregoing Praecipe is hereby admitted this 27th day of December, 1921.

Frank Kauke
Attorney for T. E. Risley, Respondent.

Endorsed: ORIGINAL *No. 767* In United States District Court Southern District of California Northern Division *In the Matter of* KIMBALL & WEBB *Bankrupt* PRAECIPE FOR TRANSCRIPT OF RECORD FILED Jan. 9 - 1922 at 55 min. past 10 o'clock A. M. *CHAS. N. WILLIAMS, Clerk,* Murray E. Wire, *Deputy* W. T. CRAIG & Elmore Winkler BOARD OF TRADE ROOMS HIGGINS BUILDING TELEPHONES: HOME 10112, SUNSET MAIN 4622 LOS ANGELES CAL. *Attorney for*————————

STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

WM. H. MOORE, JR., Trustee in Bankruptcy, *Appellant,*
vs.
T. E. RISLEY, *Appellee.*

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 28 pages, numbered from 1 to 28 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation on appeal, order of referee, statement of the case on appeal, minute order of Dec. 19th, 1921, notice of appeal, petition for allowance of appeal and order allowing same, assignment of errors, and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $8.80 and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America,

in and for the Southern District of California, Southern Division, this 19th day of January, in the year of our Lord One Thousand Nine Hundred and Twenty-one, and of our Independence the One Hundred and Forty-sixth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

Seal

By R. S. Zimmerman
Deputy.